Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-194

CHAMPION OIL COMPANY, INC.,
an Alaska Corporation,

Petitioner,

CHARLES F. HERBERT, Commissioner,
and THOMAS E. KELLY, Former
Commissioner of Department of
Natural Resources; F. J. KEENAN,
Director of Division of Lands;
THE STATE OF ALASKA; and F. T.
WETZEL,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Alaska

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TABLE OF CONTENTS

	Page
Citation to Opinions Below	2
Jurisdiction	2
The Questions Presented	2
Constitutional Provision, Statutes and Regulations Involved	5
Statement	5
Reasons for Granting Writ	17
Conclusion	25

Appendix:
(a) Opinion of the Supreme Court of the State of Alaska.
(b) Opinion of the Superior Court for the State of Alaska.

Authorities Cited

Cases:

Bishop v. Wood, 426 U.S. 341 (1976) 17,18,20,21,22

Board of Curators of the University of Missouri v. Horowitz, 434 U.S. ____(1978) 18

TABLE OF CONTENTS

Cases continued: Page

Memphis Light, Gas and Water Division v. Craft, 434 U.S. ____(1978) 17,19,20,21

Mullane v. Central Hanover Trust Co., 339 U.S. 300 (1950) 24

Other Authorities:

1977 Duke L.J. 453 21

Constitutional Provisions

United States Constitution Amendment XIV 5

Statutes:

28 U.S.C. 1257 2,5

A.S. 38.05.020 6

A.S. 38.05.035 5

A.S. 38.05.180 6

Regulations:

11 A.A.C. 505.11 6,8
11 A.A.C. 84.108 3,6,8
11 A.A.C. 84.110 3,7,8,22,23
11 A.A.C. 84.112 7,9

TABLE OF CONTENTS

Regulations Continued:	Page
11 A.A.C. 84.114	3,7,9
11 A.A.C. 84 132	7,10
11 A.A.C. 84 136	8,10

IN THE SUPREME COURT
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vs.

CHARLES F. HERBERT, Commissioner, and THOMAS E. KELLY, Former Commissioner of Department of Natural Resources; F. J. KEENAN, Director of Division of Lands; THE STATE OF ALASKA; and F. T. WETZEL,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska

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The Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the State of Alaska entered in the above case on May 5, 1978.

CITATION TO OPINION BELOW

The opinion of the Superior Court of the State of Alaska granting Respondents' Motion for Summary Judgment is printed in Appendix B hereto and is not reported.

The opinion of the Supreme Court of the State of Alaska, which affirmed the judgment of the Superior Court for the State of Alaska is printed in Appendix A hereto and is reported at 578 P.2d 961.

JURISDICTION

The opinion of the Supreme Court of the State of Alaska printed in Appendix A hereto, was entered on May 5, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

On September 10, 1969, the State of Alaska conducted the 23rd Oil and Gas Lease Sale by competitive bidding

conducted pursuant to 11 A.A.C. 84. 11 A.A.C. 84.108 provided that " The Director [of Natural Resources] may, but need not prescribe the minimum bid that will be considered," and 11 A.A.C 84.110 provided that "the minimum bid that will be considered, if the director elects to prescribe any minimum bid...shall be published...in at least one newspaper of general circulation..." 11 A.A.C. 84.114.

1. Is a participant in a competitive bid lease sale of public mineral lands entitled to such minimum due process protection as will afford him notice, prior to bidding, of the minimum requirements which must be met in order to effectively pursue and compete for acquisition of the offered lands?

(a) Did the laws of the State of Alaska create <u>any</u> interest in such a participant?

(b) If such an interest was created, did it amount to a property interest or claim of entitlement within the meaning of the Due Process Clause thus requiring minimum due process protection?

(i) Is the existence of a property interest or claim of entitlement determined by state law or federal constitutional law? That is, once the state has created an interest or claim of entitlement, will principles of federal constitutional law or state law be applied to determine whether such status or opportunity must be deemed a property interest or "legitimate claim of entitlement?"

(c) If such a participant does possess a claim of entitlement or property interest, to what extent is such an interest accorded due process protections?

(d) Did the failure of the Director of the Division of Lands to publish notice

of minimum bid requirements, in violation of state regulations, deprive such participant of the minimum due process protections to which it was entitled?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions

"...nor shall any State deprive any person of life, liberty, or property, without due process of law..." United States Constitution, Amendment XIV

Federal Statutes

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...

(3) By Writ of Certiorari, where ...any title, right, privilege or immunity is especially set up or claimed under the constitution... of...the United States." 28 U.S.C. 1257 (1948)

Alaska Statutes

"...(a) The Director shall... (4) prescribe application procedures and practices for the sale,

lease or other disposition of available lands, resources, property, or interest in them." A.S. 38.05.035 (1959)

"...(b) the Commissioner may (1) establish reasonable procedures and adopt reasonable rules and regulations..." A.S. 38.05.020 (1959)

"...whenever oil or gas is discovered in commercial quantities, the Commissioner shall determine the extent of the area of lands...which, by reason of the discovery, the Commissioner reasonably believes to be capable of producing oil or gas, and the additional lands shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations ..." A.S.38.05.180 (1959)

Alaska Administrative Code

"Competitive lands may be leased only upon competitive bidding by cash bonus bids submitted in response to a published notice of leased offer." 11 A.A.C. 505.11 (1967)

"The Director may, but need not, prescribe the minimum bid that will be considered at any lease sale. 11 A.A.C. 84.108 (1959)

"When competitive lands are offered for lease, a notice of lease offer shall be published. The notice shall specify as to each lease offered
...
(9) The minimum bid that will be considered if the Director elects to prescribe any minimum bid..." 11 A.A.C. 84.110 (1959)

"The notice of lease offer shall be published once a week for three consecutive weeks preceeding the time of the lease sale. Not less than one week shall elapse between the first appearance of the published notice and the date of the lease sale." 11 A.A.C. 84.112 (1959)

"The notice shall be published in at least one newspaper of general circulation in the vicinity of the lands offered for lease, if if there be such a newspaper, and in the vicinity of the principal office of the division and in at least one newspaper of general circulation in the vicinity of the place of the lease sale if such place is not in the vicinity of the principal office of the Division." 11 A.A.C. 84.114. (1959)

"The Director, with the concurrence of the Commissioner, may reject all bids if he determines that the best interests of Alaska justify such action." 11 A.A.C. 84.132 (1959)

"Within a reasonable time following the lease sale, the Director shall award the lease to the responsible qualified bidder offering the highest cash bonus and complying with the bid requirements unless all bids are rejected." 11 A.A.C. 84.136 (1959)

STATEMENT

In 1969, the Alaska Administrative Code provided:

"Competitive lands may be leased only upon competitive bidding by cash bonus bids submitted in response to a published notice of lease offer." 11 A.A.C. 505.11 (1967)

"The Director may, but need not, prescribe the minimum bid that will be considered at any lease sale." 11 A.A.C. 84.108 (1959)

"When competitive lands are offered for lease, a notice of lease offer shall be published. The notice shall specify as to each lease offered...
(9) the minimum bid that will be considered if the Director elects to prescribe any minimum bid ..." 11 A.A.C. 84.110 (1959)

Pursuant to the above Alaska Administrative Code sections, the

Director of the Alaska Division of Lands notified the petroleum industry by open letter, dated July 10, 1969, that the State of Alaska would accept competitive bids on one hundred seventy-one (171) tracts of oil-producing land on the Alaskan North Slope. A second notice, dated August 11, 1969, announced that eight (8) additional tracts would be offered for lease. The notice set forth bidding procedures and requirements but stated no minimum prescribed bid. Pursuant to Alaska Administrative Code 11 A.A.C. 84.114 and 11 A.A.C. 84.112, said notice was published in two local newspapers on August 12, 19 and 26, 1969.

Petitioner, Champion Oil Company, Inc. is a corporation organized and existing under the laws of the State of Alaska. In response to the published notice mentioned above, Petitioner bid on all

leases offered in the 23rd Competitive Oil and Gas Lease Sale on September 10, 1969. Since no minimum bid was published, as required by the Alaska Administrative Code, Petitioner submitted bids on each of the one hundred seventy nine (179) tracts in the amount of "One Dollar ($1.00) or more" per tract. Petitioner duly complied with all bidding requirements set out in the notice.

The Alaska Administrative Code further provided:

> "Within a reasonable time following the lease sale, the director shall award the lease to the responsible qualified bidder offering the highest cash bonus and complying with the bid requirements unless all bids are rejected." 11 A.A.C. 84.136.
>
> "The Director, with the concurrence of the Commissioner, may reject all bids if he determines that the best interests of Alaska justify such action. 11 A.A.C. 84.132.

Petitioner was the only bidder, and therefore was the responsible, qualified bidder offering the highest cash bonus on seven (7) of the offered tracts in the 23rd Competitive Oil and Gas Lease Sale. Nevertheless, on September 17, 1969, the Director of the Division of Lands, with the concurrence of the Commissioner of Natural Resources, rejected Petitioner's bids on the basis that it was "not in the best interest of the State of Alaska to accept the apparent high bids submitted" by Petitioner.

On November 5, 1976, Pedro Denton, the Chief of the Mineral Section for the State of Alaska, Division of Lands, filed an affidavit stating the reasons for rejecting the Petitioner's bids. On page five of said affidavit, Mr. Denton stated that "since the amount bid was so small and since he bid upon each and every tract offered at the sale we felt that the bids

were not meant to be seriously considered." At page 11 Mr. Denton further stated that "[I]t was also felt that the Department should consider that no bids were even received on these particular seven (7) tracts since the '$1.00 or more' bids could not be considered as bids intended to compete for oil and gas leases." Finally, he stated that "[A]t any rate, it was certainly felt that it would not be in the best interests of the State of Alaska to consider Champion Oil's offer of '$1.00 or more' bonus bids for these seven (7) tracts."

On October 10, 1969, Petitioner filed a Summons and Complaint in the Superior Court of the State of Alaska, Third Judicial District (No. 69-2747D) challenging the Director's decision. On July 17, 1973, said action was dismissed without prejudice for failure to prosecute.

On July 15, 1974, Petitioner again filed a Summons and Complaint in the Superior Court of the State of Alaska, Third Judicial District,(No. 77-4411). In the First Claim for Relief, Paragraph No. Two of said Complaint, Petitioner alleged that it was:

> "...an aggrieved bidder entitled to receive oil and gas leases under competitive bid procedures conducted by the Alaska Division of Lands... ."

Paragraph No.10 of said Claim for Relief further alleged that:

> " The sole and only bids upon the tracts herein in question were submitted by the plaintiff, and though defendants purportedly have the right under appropriate regulations to specify minimum acceptable bids, no minimum bids were published, and plaintiff being high bidder upon said tracts is entitled to receive leases upon same pursuant to the provisions of 505.51 Alaska Oil and Gas Leasing Regulations, the XIV Amendment to the United State Constitution, and

> Article I, Sections 1 and 7 State of Alaska Constitution, in that the majority of other high bidders at the 23rd Lease Sale were issued leases, and plaintiff is entitled to the same equal treatment and defendant's action in denying same deprives plaintiff of a valuable property rights [sic] without due process of law, which is prescribed [sic] by the constitutional provisions referred to."

On November 11, 1976, the State answered Petitioner's Complaint and moved for Summary Judgment. On February 23, 1977 Judge Ralph E. Moody, Presiding Superior Court Judge for the Third Judicial District of the State of Alaska, granted Respondents' Motion for Summary Judgment, holding that "there appears to

be a rational basis for rejecting the bids on the basis that the bids were not in the best interest of the State" and affirming the decision of the Commissioner of Natural Resources and the Director of the Division of Lands to reject the Petitioner's bids.

Petitioner appealed the Summary Judgment on March 21, 1977, by filing a Notice Of Appeal And Statement Of Points. Said Statement of Points raised the following federal constitutional issues now sought to be reviewed:

> "3. Does due process require the Commissioner of Natural Resources to issue leases to qualified bidders for a competitive lease sale?
> ...
> 5. The Commissioner of Natural Resources must publish minimum bids in order to comply with standards of due process."

Additionally, Petitioner's Statement of Points raised the question of the validity of the delegation of state legislative authority.

The federal constitutional issues of due process raised by prior counsel in Petitioner's Statement of Points was discussed briefly in Petitioner's Appellate Brief, as follows:

" POINT III
DUE PROCESS REQUIRES THE COMMISSIONER OF NATURAL RESOURCES TO ISSUE LEASES TO THE HIGHEST QUALIFIED BIDDER

> [Due] process is, and always will be, a difficult concept to reduce to application or define by language. The basic concept of due process may be subdivided into procedural and substantive rights; both of which are subject to action. In the present case, the Commissioner of Natural Resources conduct has offended the doctrine of fundmental [sic] fairness. The bid of Champion Oil Company was accepted as the apparent high bidder and yet was rejected by a bland reference 'not in the best interest of the State.' Such a cavalieered [sic] determination and rejection without any indication of basis other than that already stated certainly is offensive to the traditional notions of fair play and substantial justice which has long been a part of American Jurisprudence. International

Shoe Company v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945)"

The Alaska Supreme Court addressed itself only to the aforementioned delegation issue, without considering the federal constitutional issue of due process. It affirmed the Order of Summary Judgment entered by the Superior Court.

REASONS FOR GRANTING WRIT

(1) The issues raised by this case lend themselves to the resolution of substantial and important questions concerning the Fourteenth Amendment protection of state-created claims of entitlement or other interests denominated as property within the meaning of the Fourteenth Amendment.

The recent cases of Bis[illegible]ood, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976) and Memphis Light, Gas and Water Division v. Craft, 434 U.S. ____,

56 L.Ed 2d 30, 98 S.Ct. 1554 (1978), appear to set forth conflicting answers to the question of whether state law or federal constitutional law is to control the availability and dimension of minimum Fourteenth Amendment protection to be accorded private interests in state-created benefits.

In Bishop v. Wood, the Court has stated that the existence of a property interest and the availability and dimension of Fourteenth Amendment protection to be accorded such an interest is a matter determined by state law. This principle was underscored, in dictum, in Board of Curators of the University of Missouri v. Horowitz, 434 U.S. ____, 55 L.Ed.2d 124, 98 S.Ct. 948 (1978), wherein it was stated that:

> "Because property interests are creatures of state law, Perry v. Sindermann, 408 U.S. 593, 599-603 (1972), respondent would have

> been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law."

However, in Memphis Light, Gas and Water Division v. Craft, the Court recognized that a property interest may be created pursuant to state law, but went on to say that:

> "Federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602, (1972)."

Thus, it appears that there is a fundamental and substantial conflict between these cases.

Additionally, the Court in Memphis Light, Gas and Water Division v. Craft went beyond protections afforded by the regulations or procedures set forth by municipality itself, stating that:

> "An elementary and fundamental requirement of the due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action... ."

The Court held that, notwithstanding the availability of remedies provided by the agency's regulations, sufficient due process protections were absent.

The result obtained in Memphis Light, Gas and Water Division v. Craft, would not appear possible under guidelines enunciated in Bishop v. Wood, yet the latter case was not overruled. Although the majority opinion in Craft distinguished Bishop, apparently on the ground that the state law in Bishop permitted termination (of employment) without cause, whereas the state law in Craft permitted termination (of utility service) only for cause, this distinction does not appear to account for the Craft Court's imposition of Fourteenth Amendment protections exceeding those found in the

regulations of the municipal utility. While the principles of Bishop would require limiting due process protections to the remedies provided in the municipal regulations, the Court in Craft stated that:

> "The availability of such local-law remedies is evidence of the State's recognition of a protected interest."

The fundamental question which arises is substantial and important simply because the answer will determine the degree to which state and local governments may limit due process protections available under the Fourteenth Amendment. See generally Notes, Democratic Due Process: Administrative Procedure After Bishop v. Wood, 1977 Duke L.J. 453, 465.

(2) Under the facts here presented, application of the principles set forth

in Bishop would seemingly require that Petitioner be found to possess a claim of entitlement subject to minimum Fourteenth Amendment protections. This is so because A.S. 38.05 (Alaska Land Act) and Alaska Oil and Gas Leasing Regulations, 11 A.A.C. 84., create a right and a procedural protection thereof. More specifically, 11 A.A.C. 84.110(9) required that notice be published in the event the Director of the Division of Lands prescribed minimum bids. Having actively pursued the acquisition of this government largess, Petitioner acquired a legitimate claim of entitlement to the extent that it met the published requirements. This interest was entitled, under the ruling of Bishop, to that amount of state and Fourteenth Amendment protection as the state chose to provide by statute or regulation. The minimum notice protection, as provided for under A.A.C.

84.110(9), was violated by the state. Petitioner having been the only bidder on seven tracts, notice of the minimum bid requirements, as mandated by agency regulations, would have allowed Petitioner the opportunity to meet that minimum and thereby acquire the seven tracts. Lack of the requisite notice deprived Petitioner of such opportunity, thereby depriving it of a legitimate claim of entitlement without due process of law as required by the Fourteenth Amendment.

(3) 11 A.A.C. 84.110(9) provided that notice was to be published in the event the Director set a minimum bid requirement on the offered tracts. Manifestly, this provision was enacted for the benefit and protection of those participating in the bid lease sale, as was Petitioner. While such a notice provision may very well have been unnecessary to meeting minimum due process requirements, provision for such notice and consequent

violation of that provision by the state, to the prejudice of one relying upon such notice provision, was fundamentally unfair. Notice of requirements bearing upon one's legal and business affairs is a fundamental element of due process under the Fourteenth Amendment. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950).

Thus, although the absence of such notice provision would not have necessarily offended due process, the existence of a positive provision for notice led Petitioner to rightfully expect such notice in the event the Director chose to set minimum bid requirements. The amount of Petitioner's bid was based upon the rightful and reasonable belief that no bid minimum existed. The failure of the Director to apprise Petitioner of the minimum bid violated 11 A.A.C. 84.110(9) and deprived Petitioner of any meaningful opportunity to compete for these government benefits.

Petitioner submits that such action by the state offended all concepts of fundamental fairness and deprived it of a legitimate claim of entitlement without due process of law as guaranteed by the Fourteenth Amendment.

CONCLUSION

The Petition for certiorari should be granted.

Respectfully submitted,

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THE SUPREME COURT OF THE STATE OF ALASKA

CHAMPION OIL COMPANY, INC., an Alaska Corporation, Appellant, v. CHARLES F. HERBERT, Commissioner, and THOMAS E. KELLY, Former Commissioner, Department of Natural Resources, F. J. KEENAN, Director of Division of Lands, and the STATE OF ALASKA, Appellees.	File No. 3385 O P I N I O N [No. 1621 - May 5, 1978]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Judge.

Appearances: Ty R. Settles, Anchorage, for Appellant. Jeffrey B. Lowenfels, Assistant Attorney General, Anchorage, and Avrum M. Gross, Attorney General, Juneau, for Appellees.

Before: Boochever, Chief Justice, Rabinowitz, Connor and Matthews, Justices, and Dimond, Justice Pro Tem. [Burke, Justice, not participating]

RABINOWITZ, Justice.

This appeal has its genesis in the 23rd Competitive Oil and Gas Lease Sale which was conducted by the State of Alaska in September 1969.[1] In relevant part, the pertinent notice of sale provided:

> A lease will be awarded on each tract to the responsible qualified bidder offering the highest cash bonus for that tract unless all bids on the tract are rejected or a preference right is exercised. If a lease is not issued to a bidder whose bid is retained, the lands in the tract involved will be held and be subject to nomination and offering at a later sale.
>
> . . . .
>
> (b) . . . The bid . . . shall be accompanied by one or more cashier's or certified checks drawn on any solvent bank in the United States, money order, or cash or any combination thereof in a total amount of at least 20 percent (20%) of the amount of the bid. (emphasis supplied)

Pursuant to this notice, Champion Oil submitted bid proposals on all of the tracts involved in the 23rd lease sale in the amount of "one dollar or more." Each bid envelope submitted by Champion contained the sum of 20 cents, representing the required 20% deposit. On seven tracts Champion Oil's bids

1. A previous appeal in this case did not call for decision on the merits; only procedural questions were addressed in Champion Oil Co., Inc. v. Herbert, 552 P.2d 670 (Alaska 1976).

were the high bids, as no other bids were received on these tracts.[2] Subsequently, Champion Oil's bids were rejected as not being "in the best interest of the State of Alaska."

Champion Oil then instituted suit in superior court claiming it was entitled to be awarded leases on the seven tracts.[3] The State of Alaska moved for summary judgment which was granted by the superior court. In its memorandum decision, the superior court concluded:

> [T]here appears to be a rational basis for rejecting the bids on the basis that the bids were not in the best interest of the State. Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971).
>
> There being no genuine issue of fact to be decided,
>
> IT IS ORDERED that the decision of the Commissioner of Natural Resources and the Director of Division of Lands, to reject the plaintiffs' bids, is affirmed.

Champion Oil brings this appeal from the superior court's grant of summary judgment to the State of Alaska. The primary contention advanced by Champion Oil, in support of its overall position that entry of summary judgment was

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2. In all 1,102 bids were submitted on the 179 tracts involved in the sale which encompassed 450,858.47 acres of land. The average bid per tract was $5,029,154.13 and the average bid per acre was $1,996.68.

3. The earlier procedural history of this case is recounted in this court's previous decision, Champion Oil Co., Inc. v. Herbert, 552 P.2d 670, 671 (Alaska 1976).

inappropriate, is that AS 38.05.180[4] embodies an impermissibly overbroad delegation of legislative authority to the Commissioner of Natural Resources. Our study of this specification of

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4. AS 38.05.180(a) provides: All tide and submerged lands, mental health lands, school lands, and university lands shall be leased by competitive bidding, and whenever oil or gas [is] discovered in commercial quantities, the commissioner shall determine the extent of the area of lands in addition to tide, submerged, mental health lands, school, or university lands in the same general area of the discovery well which, by reason of the discovery, the commissioner reasonably believes to be capable of producing oil or gas, and the additional lands shall be leased to the highest reasponsible qualified bidder by competitive bidding under general regulations, in units of not exceeding 2,560 acres (except that tide and submerged lands shall be leased in units of not exceeding 5,760 acres), which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the commissioner and of such royalty as may be fixed in the lease which shall not be less than 12 1/2 per cent in amount or value of the production removed or sold from the lease. All lands other than those above provided to be leased by competitive bidding may be leased competitively or noncompetitively as determined by the commissioner to be in the best interests of the state. Noncompetitive leases shall be issued in units of not exceeding 2,560 acres in any one lease. Noncompetitive leases shall be conditioned upon the payment by the lessee of a royalty of 12 1/2 per cent in amount or value of the production removed or sold from the lease. Competitive leases issued under this subsection shall be for 10 years except that in the Cook Inlet sedimentary

error has convinced us that the appeal is devoid of merit. We thus affirm the superior court's grant of summary judgment in favor of the State of Alaska.

It is well established that the burden is placed on the party moving for summary judgment to demonstrate the

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(footnote 4 continued)

> basin, leases shall be for a primary term of not more than 10 years and not less than five years at the discretion of the commissioner, and shall continue so long thereafter as oil or gas is produced in paying quantities. Noncompetitive leases issued under this subsection shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities. If drilling has commenced on the expiration date of the primary term of the lease and is continued with reasonable diligence, such operations to include redrilling, sidetracking or other means necessary to reach the originally proposed bottom hole location, the lease shall continue in effect until 90 days after drilling has ceased and for so long thereafter as oil or gas is produced in paying quantities. If all or part of the lands covered by the lease are lands that have been selected by the state under laws of the United States granting lands to the state and a patent has not been issued on them, a conditional lease may be issued. However, no term extension may be granted for the period during which the lease was conditional.

absence of any genuine issues of material fact before summary judgment is appropriate. See Alaska Rent-a-Car, Inc. v. Ford Motor Co., 526 P.2d 1136, 1138 (Alaska 1974). The party opposing the motion is not required to show that it will prevail at trial, but it must demonstrate that there exists a genuine issue of material fact to be litigated. Id. at 1139. Viewing the facts most favorably to Champion Oil, study of the record reveals an absence of any genuine issues of material fact.[5] It is uncontested that Champion Oil was the apparent high bidder on the seven tracts in question. It is also uncontested that these bids were rejected by the Commissioner of Natural Resources as not being "in the best interest of the State of Alaska."

As indicated previously, the primary legal argument

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5. Champion Oil filed the following as purported "Genuine Issues of Material Fact":

> 1. Was the bid of Champion Oil accepted as the high bid.
>
> 2. Was the Commissioner of the Department of Natural Resources acting arbitrarily.
>
> 3. Did the Department of Natural Resources accept Champion Oil Company's bid.
>
> 4. Were any identifiable standards applied by the Department of Natural Resources.
>
> 5. Did the Commissioner of Natural Resources abuse his discretion.

advanced by an appellant is whether AS 38.05.180(a)[6] embodies an overbroad delegation of legislative authority to the Commissioner of Natural Resources. Closely alligned with this argument is the further contention that 11 AAC 505.11, 11 AAC 505.43 and 11 AAC 505.51[7] are invalid regulations. In our view, Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971), is dispositive of these contentions. Kelly v. Zamarello arose out of the same oil and gas lease sale as does the present case. There we addressed a challenge to the validity of

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6. See note 4, supra.

7. The applicable regulations at the time of the 23rd Competitive Oil and Gas Lease Sale are reproduced belos.

11 AAC 505.11 provided, in part:

> Competitive lands may be leased only upon competitive bidding by cash bonus submitted in response to a published notice of lease offer. . . .

11 AAC 505.43 provided:

> The Director, with the concurrence of the Commissioner, may reject all bids if he determines that the best interest of Alaska justify such action.

11 AAC 505.51 provided:

> Within a reasonable time following the lease sale, the Director shall aware the lease to the responsible qualified bidder offering the highest cash bonus and complying with the bid requirements unless all bids are rejected.

11 ACC 505.11 and 11 AAC 505.51 and sustained the regulations. In addition, we implicitly upheld the validity of AS 38.05.180(1) and explicitly determined that the legislature had given the Commissioner of Natural Resources "broad authority" concerning competitive bidding procedures.[8] Furthermore, in discussing 11 AAC 505.11 and 11 AAC 595.51, we conclude:

> [W]hen a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute. [9]

In Kelly v. Zamarello, we also held that neither 11 AAC 505.11 nor 11 AAC 505.51 was unreasonable or arbitrary.

Concerning 11 AAC 505.43 -- which allows the Director, with the concurrence of the Commissioner, to reject all bids if he determines that they are not in the

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8. Kelly v. Zamarello, 486 P.2d 906, 912 (Alaska 1971). We also noted that AS 38.05.020 (b)(1) authorized the Commissioner to "establish reasonable procedures and adopt reasonable rules and regulations necessary to carry out" the Alaska Land Act. Id.

9. Id. at 911

10. Id. at 912-13. See note 7, supra, for the texts of 11 AAC 505.11 and 11 AAC 505.51.

best interests of the State of Alaska -- we note that this is the type of "valid regulation" anticipated by Kelly v. Zamarello. Although in Kelly v. Zamarello, we did not explicitly address the issue of the validity of 11 AAC 505.43,[11] we did state, in part:

> [I]t is not unreasonable for the Commissioner to determine that it is in the state's best interest to receive compensation for the leases immediately upon the award of the lease, rather than to wait for uncertain sums to arrive in the form of premium royalties. [12]

In light of the foregoing, we conclude that the "best interests" standard of 11 AAC 505.43 is not unreasonable, arbitrary or legally deficient.

Concerning the applicable standard of judicial review of decisions made by the Department of Natural Resources, we held in Kelly v. Zamarello that "[t]he decision by the Department of Natural Resources [in finding that the bids were nonresponsive] is a proper one for application of the reasonable basis standard of judicial review."[13] Noting that this test "is extremely useful where the

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11. See note 7, supra, for the text of 11 AAC 505.43.

12. Kelly v. Zamarello, 486 P.2d 906, 912 (Alaska 1971).

13. Id. at 915.

administrative action under review resembles executive as opposed to legislative or judicial activity,"[14] we said in Kelly v. Zamarello, "We do not pretend to know the precise motivation of the Commissioner in rejecting plaintiffs' bids . . . ; it is sufficient for our purposes to note that there are reasonable bases to support such a rejection."[15] In the case at bar, the record adequately shows that the Commissioner and the Director had a reasonable basis to determine that acceptance of Champion's $1.00 per tract bid for the oil and gas lands involved would not be in the best

---

14. Id. at 916.

15. Id. at 918.

interests of t state.[16] Among the facts the record, we

---

16. Appellant has articulated the following additional specifications of error:

> 1. The Regulations of the Department of Natural Resources are an invalid delegation of legislative authority.
>
> . . . .
>
> 3. Due process requires the Commissioner of Natural Resources to issue leases to the highest qualified bidder.
>
> 4. The Trial Court erred in ruling a rational basis exists.
>
> 5. Minimum bids must be published.
>
> 6. The standard of 'in the best interests of the State' is a pre-lease determination.
>
> 7. The Trial Court erred in granting Summary Judgment as a genuine issue of material fact existed.

We deem it unnecessary to explicitly address the other issues raised by appellant as our analysis of them has not persuaded us that the superior court erred in granting summary judgment to the state. Nevertheless, we do think it appropriate to make the following observations.

The notice of sale specifically provided that the lease would be awarded "unless all bids on the tract [were] rejected . . . ." In rejecting Champion Oil's bid on each of the seven tracts in question, the state rejected all bids on those tracts and was well within its rights in so doing. Appellant's arguments that the Commissioner's actions deny him due process and that statutory language mandates the Commissioner to lease to the highest bidder do not withstand a simple reading of the statute or the notice of sale.

Appellant also contends that minimum bids must be published. However, 11 AAC 505.15 specifically states:

> The director may, but need not, prescribe the

think it is necessary to note only the enormous disparity between the bids of Champion Oil and the average bids on the tracts leased.[17] In our view, this disparity in and of itself demonstrates the existence of a reasonable basis for the decision of the Commissioner of Natural Resources and the Director of the Division of Lands.

The superior court's grant of summary judgment to the State of Alaska is Affirmed.[18]

(footnote 16 continued)

> minimum bid that will be considered at any lease sale.

Furthermore, there is no indication that minimum bids were established with regard to the lease sale in question.

17. See note 2, supra.

18. We also think it appropriate to reiterate the observations made in Ault v. Alaska State Mortgage Ass'n, 387 P.2d 698, 701-02 (Alaska 1963), where we remanded a summary disposition of a constitutional challenge to the creation of the Alaska State Mortgage Association due to an inadequate evidentiary record:

> We are not holding that summary judgment procedure in cases of this nature is unacceptable. We do hold that if summary procedure is employed in cases involving important public issues where any fact is in dispute the trial judge should not attempt to render a decision unless he is satisfied that the evidence, both pro and con, is sufficient to give him the necessary background of knowledge.

IN THE TRIAL COURTS FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHAMPION OIL COMPANY, INC., an Alaska corporation, et al.,

Plaintiffs,

vs.

CHARLES F. HERBERT, Commissioner, et al.,

Defendants.

No. 74-4411

MEMORANDUM DECISION

Upon consideration of the documents, the bids in question, and the statute and regulation involved, there appears to be a rational basis for rejecting the bids on the basis that the bids were not in the best interest of the State. Kelly v. Zamarello, 486 P.2d 906 (Ak. 1971).

There being no genuine issue of fact to be decided,

IT IS ORDERED that the decision of the Commissioner of Natural Resources and the Director of Division of Lands, to reject the plaintiffs' bids, is affirmed.

DONE at Anchorage, Alaska, this 23rd day of February, 1977.

Ralph E. Moody, Presiding
Superior Court Judge

I certify that on 2/23/77, I mailed a true and correct copy of the above Memorandum Decision to the following at their addresses of record: AG/Lowenfels; Frank Wetzel, pro per; Ty Settles.

Secretary to Judge Moody

APPENDIX B

RECEIVED
FEB 25 1977
Settles & Kalamarides

Supreme Court, U. S.
FILED
NOV 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-194

CHAMPION OIL COMPANY, INC.,
an Alaska Corporation,

Petitioner,

v.

CHARLES F. HERBERT, Commissioner,
and THOMAS E. KELLY, Former Commissioner of
Department of Natural Resources;
F. J. KEENAN, Director of Division of Lands;
THE STATE OF ALASKA; and F. T. WETZEL,

Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

Page

CITATIONS TO OPINIONS BELOW 2
JURISDICTION 2
SUMMARY OF ARGUMENT 2
STATEMENT OF THE CASE 5
CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Bishop v. Wood, 426 U.S. 341, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976) 7, 8

Bruce Anderson, GFS BLM-1963-75, Riverside 03565 (No. 7, 1963) 11

Erie Coal & Coke Corporation v. United States, 266 U.S. 518 (1925) 11

F.B. Umbarger, GFS BLM-1954-1 64367 (Dec. 17, 1953) 11

Gasco, Inc., GFS BLM-1970-9, Colo. 9189 (Nov. 24, 1969) 11

George E. Conley, GFS BLM-1969-32, N.M. (July 8, 1969) 11

H & H Oil Co., Inc., 22 I.B.L.A. 313, GFS (O & G) 133 (1975) 12

Holiday v. Higbe, 172 F.2d 316, 318 (1949) 11

Howell Spear, 8 I.B.L.A. 324 (1972) 12

Howell Spear, GFS BLM-1958-31, BLM 044060 (Wyo.) (Jan. 21, 1958) 11

John M. Kelly, 5 I.B.L.A. 324 (1972) 11

Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971) 8, 10, 14

L.W. Winkler, GFS BLM-1958-129, BLM 052714, et al. (Wyo.) (July 24, 1958) 11

Memphis Light, Gas & Water Division v. Kraft, 434 U.S. 56 L.Ed.2d 30, 98 S.Ct. 1554 (1978) 7, 12, 13, 14

Cases, continued: Page

Philip R. Collins, GFS BLM-1967-19, ES 1572 (March 30, 1967) 11

United States v. Weisbroad, 202 F. 629, 631 (1953) 11

Other Authorities:

Henriques, 14 Rocky Mt. Min. L. Inst. 33 (1968) 12

Statutes:

28 U.S.C. 1257 2

A.S. 38.05.020(b)(1) 2, 3, 10

A.S. 38.05.180(a) 3, 4, 10

Regulations:

11 A.A.C. 84.110(9) 4, 13

11 A.A.C. 505.11 . . . . . 4, 9

11 A.A.C. 505.15 . . . . . 5, 13

11 A.A.C. 505.43 . . . . . 5, 9

11 A.A.C. 505.51 . . . . . 5, 9, 10, 11

IN THE

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No. 78-194

CHAMPION OIL COMPANY, INC.,
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v.

CHARLES F. HERBERT, Commissioner,
and THOMAS E. KELLY, Former Commissioner of
Department of Natural Resources;
F. J. KEENAN, Director of Division of Lands;
THE STATE OF ALASKA; and F. T. WETZEL,

Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Respondent prays that this court deny the issuance of a Writ of Certiorari to review the judgments of the Supreme Court of the State of Alaska entered in the above case on May 5, 1978.

CITATION TO OPINION BELOW

The opinions of the Superior Court of the State of Alaska and the Supreme Court of the State of Alaska are printed in Appendix A and B of Petitioner's Brief.

JURISDICTION

The Jurisdiction of this court is properly invoked pursuant to 28 U.S.C. 1257.

SUMMARY OF ARGUMENT

Petitioner does not have a legitimate claim of entitlement which would require the protection afforded by the Due Process Clause because they participated in the 23rd Oil and gas lease sale the notice to which specifically stated that the Department of Natural Resources reserved the right to reject the highest apparent bid on a particular tract if it rejected all of the bids on that tract.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Federal Statutes

"Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By Writ of Certiorari, where . . . any title, right, privilege or immunity is especially set up or claimed under the constitution . . . of . . . the United States." 28 U.S.C. 1257 (1948)

Alaska Statutes

A.S. 38.05.020 (b) (1) Authority and duties of the commissioner.

(b) The commissioner may

Alaska Statutes, continued:

(1) establish reasonable procedures and adopt reasonable rules and regulations necessary to carry out this chapter and may, whenever necessary, issue directives or orders to the director to carry out specific functions and duties; all rules and regulations adopted by the commissioner shall be adopted under the Administrative Procedure Act (AS 44.62); orders by the commissioner classifying lands issued after January 3, 1959, are not required to be adopted under the Administrative Procedure Act (AS 44.62);

Sec. 38.05.180 Oil and gas. (a) All tide and submerged lands, mental health lands, school lands, and university lands shall be leased by competitive bidding, and when ever oil or gas is discovered in commercial quantities, the commissioner shall determine the extent of the area of lands in addition to tide, submerged, mental health lands, school, or university lands in the same general area of the discovery well which, by reasons of the discovery, the commissioner reasonably believes to be capable of producing oil or gas, and the additional lands shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations, in units of not exceeding 2,560 acres (except that tide and submerged lands shall be leased in units of not exceeding 5,760 acres), which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the commissioner and of such royalty as may be fixed in the lease which shall not be less than 12½ per cent in amount or value of the production removed or sold from the lease. All lands other than those above provided to be leased by competitive bidding may be leased competitively or noncompetitively as determined by the

commissioner to be in the best interests of the state. Non-competitive leases shall be issued in units of not exceeding 2,560 acres in any one lease. Non-competitive leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per cent in amount or value of the production removed or sold from the lease. Competitive leases issued under this subsection shall be for 10 years except that in the Cook Inlet sedimentary basin, leases shall be for a primary term of not more than 10 years and not less than five years at the discretion of the commissioner, and shall continue so long thereafter as oil or gas is produced in paying quantities. Non-competitive leases issued under this subsection shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities. If drilling has commenced on the expiration date of the primary term of the lease and is continued with reasonable diligence, such operations to include redrilling, sidetracking or other means necessary to reach the originally proposed bottom hole location, the lease shall continue in effect unitl 90 days after drilling has ceased and for so long thereafter as oil or gas is produced in paying quantities.

Alaska Administrative Code

"11 A.A.C. 84.110 "When competitive lands are offered for lease, a notice of lease offer shall be published. The notice shall specify as to each lease offered.

. . .

(9) The minimum bid that will be considered if the Director elects to prescribe any minimum bid . . ."

"11 A.A.C. 505.11 Competitive lands may be leased only upon competitive bidding by cash bonus bids

submitted in response to a published notice of lease offer.

"11 A.A.C. 505.15 The director may, but need not prescribe the minimum bid that will be considered at any lease sale."

"11 A.A.C. 505.43 The director, with concurrence of the commissioner, may reject all bids if he determines that the best interests of Alaska justifies such action."

"11 A.A.C. 505.51 Within a reasonable time following a lease sale, the director shall award the lease to the responsible qualified bidder offering the highest cash bonus and complying with the bid requirements unless all bids are rejected."

I

STATEMENT OF THE CASE

On September 10, 1969 the State of Alsaka, acting through its Commissioner of Natural Resources and the Director of its Division of Lands held the 23rd Competitive Oil and Gas Lease Sale. The notice of that sale was published according to law. [See Appendix 1]

Champion Oil Company Inc. (hereinafter "Champion Oil" or "petitioner"), pursuant to the invitation to bid, submitted bid proposals on *all* of the tracts involved in the competitive oil and gas lease sale in the amount of $1.00 or more". Each bid envelope received from Champion Oil contained the requisite deposit of 20 percent of the bid, in this case, twenty cents (20¢). In total, one thousand, one hundred and two (1,102) bids were submitted on the hundred and seventy-nine (179) tracts

covering four hundred and fifty thousand, eight hundred and fifty-eight and forty-seven hundredths (450,858.47) acres of land involved in the sale. The average bid per tract was five million, twenty-nine thousand, one hundred and fifty-four dollars and thirteen cents ($5,029.154.13) and the average bid *per acre* was one thousand, nine hundred and ninety-six dollars and sixty cents ($1,996.60). Fifteen (15) bids were rejected. Champion Oil Co. Inc's bids were the apparent high bids on seven (7) tracts because they were, in fact, the only bids made on the tracts. These bids of "$1.00 or more" on the seven tracts involved herein were among the fifteen rejected. The Commissioner of Natural Resources rejected Champion Oil Company, Inc.'s bids on the basis that such bids were not "in the best interests of the State of Alaska." Champion Oil Co. Inc. appealed to the Superior Court of the State of Alaska. *Champion Oil v. Herbert*, 578 P.2d 961, 962, N.2 (Alaska 1978).

On November 5, 1976 the State of Alaska filed a motion for summary judgment on the pleadings. On February 15, 1977 oral argument was heard by the presiding judge of the superior court. On the 23rd day of February, 1977 the court issued its memorandum decision in which it concluded that there was a rational basis for rejecting the bids on the basis that acceptance of such bids was not in the best interest of the State of Alaska.

On March 21, 1977 Champion Oil Company, Inc. appealed the superior court judgment. The case was submitted on briefs to the Supreme Court of the State of Alaska which rendered its decision on May 5, 1978.

The Alaska supreme court affirmed the superior court decision, holding that acceptance of the bids in question would not be in the best interests of the State of Alaska. *Champion Oil Co. v. Herbert, supra.*

II

PETITIONER DOES NOT HAVE A LEGITIMATE CLAIM OF ENTITLEMENT WHICH WOULD REQUIRE THE PROTECTION AFFORDED BY THE DUE PROCESS CLAUSE

Petitioner contends that this case will enable the court to clarify the opinions of the Court in *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S. Ct. 2074 (1976) and *Memphis Light, Gas & Water Division v. Kraft*, 434 U.S. 00, 56 L.Ed. 2d 30, 98 S.Ct. 1554 (1978), with regard to the availability and dimension of minimum Fourteenth Amendment protection to be accorded private interests in state-created benefits.

Clearly the holding in *Bishop v. Wood, supra*, would seem to apply to the facts herein. In *Bishop*, an employment case, this Court held:

> A property interest in employment can, of course, be created by ordinance, or, by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

426 U.S. at 344.

The Court then went on to note that the court below found

> . . . the city manager's determination of the adequacy of the grounds for discharge was not subject to judicial review; the employee is merely given certain procedural rights which the district court

> found not to have been violated in this case. The district court's reasoning of the ordinance is tenable; it derives some support from a decision of the North Carolina supreme court, *Still v. Lance, supra;* and it was accepted by the Court of Appeals for the 4th Circuit. The reasons are sufficient to foreclose our independent examination of the state-law issue.

426 U.S. at 348. Petitioner did not have a claim of entitlement because state law allowed an enforceable expectation of continued employment only if the employer, by statute or contract, granted some form of guarantee. No statute, regulation or procedure utilized by the State of Alaska herein created any guarantee of obtaining a lease. As will be shown below, Champion Oil was on notice of the State's right to reject bids. No legitimate claim of entitlement exists. Further, as in *Bishop v. Wood, supra,* the Alaska supreme court has previously interpreted the regulation allowing the state to reject all bids as being a valid regulation. *Kelly v. Zamarello,* 486 P.2d 906, (Alaska 1971). Independent authority exists eliminating any possibility of the existance of a federal constitutional issue herein.

Petitioner contends that the bidding procedures of the State of Alaska, Department of Natural Resources, vested in it a "claim of entitlement or other interests denominated as property within the meaning of the Fourteenth Amendment." This Court need not reach the question of whether petitioner was deprived of due process because the state procedures for bidding did not vest in petitioner any property right. From the outset of the litigation resulting in this appeal, petitioner has consistently ignored painfully clear language contained in the applicable statutes, regulations and notice of sale and has deluded itself into believing that it obtained a property right as a result of its participation in the September 10, 1969 lease sale.

In its petition, for example, petitioner fails to note that the September 10, 1969 Prudhoe Bay lease sale was preceded by a notice of sale, published according to law and contained in the invitation to bid. This notice was received by petitioner prior to the delivery of the bids. Insofar as it is relevant to the subject matter of this petition the notice of sale provided, *inter alia;*

> A lease will be awarded on each tract to the highest responsible qualified bidder offering the highest cash bonus for that tract *unless all bids on the tract are rejected or preference right is exercised.* If a lease is not issued to a bidder whose bid is retained, the lands in the tract involved will be held and be subject to nomination offering at a later sale. (Emphasis added)

Thus, petitioner was on notice *prior to submission of its bids* that the state retained the right to reject all of the bids on a particular tract. Inasmuch as petitioner's one dollar bids were the only bids on the seven tracts at issue, the rejection of those bids comported with the procedures outlined in the notice of sale.

The applicable regulations at the time of the lease sale provided:

> "11 AAC 505.11. Competitive lands may be leased only upon competitive bidding by cash bonus bids submitted in response to a published notice of lease offer."
>
> "11 AAC 505.43. The Director, with concurrence of the Commissioner, may reject all bids if he determines that the best interests of Alaska justifies such action.

> "11 AAC 505.51. Within a reasonable time following a lease sale, the Director shall award the lease to the responsible qualified bidder offering the highest cash bonus and complying with all the bid requirements unless all bids are rejected."

These regulations were adopted pursuant to AS 38.05.180(a). That statute delegates to the commissioner of Natural Resources authority to issue oil and gas leases on lands of the State of Alaska upon competitive bid. This statute makes it clear that a determination to lease lands upon which commercial quantities of oil have been discovered rests within the discretion of the Commissioner of Natural Resources. This discretion has been held by the Alaska supreme court in the case of *Kelly v. Zamarello* 486 P.2d 906 (Alaska 1971) to be a valid delegation of legislative authority to the Department of Natural Resources. There the Alaska supreme court stated that the legislature:

> . . . did not itself prescribe a particular form [for bidding procedures] but instead provided that competitive bidding shall be "under general regulations", . . .

486 P.2d at 912. The court additionally noted that AS 38.05.020(b)(1) gives the Commissioner of the Department of Natural Resources the authority to "establish reasonable procedures and adopt reasonable rules and regulations necessary to carry out" the Alaska Land Act, AS 38.05 *et seq.* 486 P.2d at 912.

Even if the statute in question, the accompanying regulations and the notice of sale contained in the invitation to bid were not clear, as a matter of both state and federal law when a notice of sale of competitive oil and gas leases reserves the right to reject any and all bids, bids may be properly rejected for the reasons that they

are inadequate or otherwise not in the best interest of the public. *Erie Coal & Coke Corporation v. United States,* 266 U.S. 518 (1925); *Holiday v. Higbe,* 172 F.2d 316, 318 (10th Cir. 1949); *United States v. Weisbroad,* 202 F.2d 629, 631 (7th Cir. 1953).

Alaska's bidding procedures were derived from the procedures utilized by the United States Department of Interior (*Compare* 43 C.F.R. etc. *with* AAC 11 505.51.)[1] There is ample precedent for the actions taken by the State of Alaska as the right of rejection is always contained in federal notices of lease offers and has been exercised by the United States many times. In particular, numerous instances exist where a rejection has been based upon the fact that acceptance of the bid would not be in the interest of the United States. *See, e.g., F.B. Umbarger* GFS BLM-1954-1, 64367 (Dec. 17, 1953). In other instances, bids have been rejected because they were considered inadequate and the United States would receive higher bids in subsequent offerings. *Howell Spear,* GFS BLM-1958-31, BLM 044060 (Wyo. Jan 21, 1958); *L.W. Winkler* GFS BLM-1958-129, BLM 052714, et al. (Wyo. July 24, 1958) (sole bid rejected as nominal and insufficient); *Bruce Anderson,* GFS BLM-1963-75, Riverside 03565 (Nov. 7, 1963) (Bid rejected where circumstances indicated a higher bid would be received if the tract were again offered for lease); *Philip R. Collins,* GFS BLM-1967-19 ES 1572 (March 30, 1967); *George E. Conley,* GFS BLM-1969-32, N.M. 9029 (July 8, 1969) (bid rejected because of deficiency in amount when compared to government's estimated value); *Gasco, Inc.,* GFS BLM-1970-9. Colo. 9189 (Nov. 24, 1969); *John M. Kelly,* 5 IBLA 324

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[1] Now 43 C.F.R. §3120.3-1 (1973)

(1972) and *Howell Spear*, 8 IBLA 93 (1972) (bids rejected because of deficiency in amount when compared to estimated value fixed by the Geological Survey); *H & H Oil Co., Inc.*, 22 IBLA 313, GFS (O&G) 133 (1975) (bid rejected because of deficiency in amount when compared to estimated value fixed by the Geological Survey). *See also* Henriques, *The Impact of Recent Decisions and Administrative Procedures of the Department of the Interior on Oil and Gas Leasing by the Bureau of Land Management*, 14 Rocky Mt. Min. L. Inst. 33 (1968).

Thus, in addition to the Alaska statutory and regulatory authority to reject bids and the explicit reservation of the right to reject bids in the invitation to submit bids, federal case law makes it clear that where, in accordance with statutes and regulations, a notice of sale of competitive oil and gas leases reserves the right to reject any and all bids, the bids may be properly rejected. Surely, any alleged expectation of acquiring a property right by virtue of mere participation in a competitive oil and gas sale in Alaska is unreasonable and unfounded.

Petitioner relies upon a utility case, *Memphis Light, Gas & Water & Light Division v. Kraft, supra*, wherein this Court recognized that a property interest may be created pursuant to state law, but that

> federal constitutional law determines whether the interest rises to the level of a "legitimate claim of entitlement" protected by due process. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602 (1972).

98 S.Ct. at 1560. There, state law did not permit termination of public utility service at will. Respondent had a claim of entitlement only because the utility could not terminate service at will. The Court ruled that

the notice provisions utilized by the petitioners were defective. Here, however, the notice procedures were not defective. At all times petitioner was afforded notice "reasonably calculated" to apprise petitioner of the procedures to be utilized by the Department of Natural Resources.

Petitioner would have this Court believe that AS 38.05, The Alaska Land Act, and Alaska Oil & Gas Leasing Regulations, 11 AAC 84, created a right and further created a procedural protection thereof. Specifically, petitioner contends that 11 AAC 84.110(9) required that notice be published in the event that the Director of the Division of Lands prescribed minimum bids. Petitioner conveniently ignores 11 AAC 505.15 which stated:

> The Director may, but need not prescribe the minimum bid that will be considered at any lease sale.

Thus, the Department of Natural Resources was not required to publish minimum bids. Petitioner was on notice of this regulation. No interest was created and 11 AAC 84.110(9) was not violated by the Department of Natural Resources. Petitioner's reliance on *Memphis Light Gas & Water Division v. Kraft, supra*, is misplaced. Yet somehow, petitioner contends that having been the only bidder on seven tracts, notice of the minimum bid requirements would have allowed the petitioner the opportunity to meet that minimum and thereby acquire the seven tracts. Petitioner ignores that fact that even if minimum bids were published and petitioners had been able to meet the minimum bid specified, the Department of Natural Resources retained the right to reject all bids on a tract if it was in the best interests of the state to do so.

Further, petitioner fails to acknowledge the clear language in the notice of sale indicating that if all of the bids on a particular tract were rejected, the Department of Natural Resources could reject a bid of the highest responsible qualified bidder and fails to note a previous favorable state supreme court interpretation of the regulations involved herein, *Kelly v. Zamarello, supra.*

Despite adherence to explicitly clear instructions on bidding procedures, petitioner somehow contends that the state's treatment of it was fundamentally unfair. Petitioner received notice of the procedures to be utilized by the Department of Natural Resources and apparently failed to read them. The petitioner admits that the absence of a notice provision would not have necessarily offended due process, but that the existence of a positive provision for notice on minimum bids led petitioner to rightfully expect such notice in the event that the director chose to set a minimum bid requirement. Unfortunately petitioner relied upon conveniently select portions of Alaska statutes and regulations and ignored clear and express language in the bid procedures and regulations utilized to no one's detriment but its own.

Petitioner's reliance on *Memphis Light, Gas & Water Division v. Kraft, supra* is misplaced. Under state law petitioner does not possess a property right merely by virtue of its participation in a lease sale. Therefore under federal constitutional law petitioner does not have a statutory right to which procedural due process applies. Consequently no substantial federal question is raised by petitioner. Clearly Champion Oil's claim is frivolous and should be denied.

VI

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied forthwith.

RESPECTFULLY SUBMITTED this 1st day of November, 1978.

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By: _____

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Counsel for Respondents.

APPENDIX

APPENDIX

August 11, 1969

NOTICE OF COMPETITIVE OIL AND GAS LEASE SALE NO. 23

Subject to the provisions of the Alaska Land Act (AS 38.05) and the Alaska oil and gas leasing regulations currently in effect, the Director of the Division of Lands, hereinafter called Director, or his authorized agent will accept sealed bids for competitive oil and gas leases described hereinafter. The sale will be held September 10, 1969, at the Sydney Laurence Auditorium, 6th and "F" Streets, Anchorage, Alaska, at 8:00 a.m., A.D.T.

DESCRIPTION OF TRACTS OFFERED IN THE 23 RD COMPETITIVE OIL AND GAS LEASE SALE

Leasing tracts of lands included in the sale are located in the Umiat Meridian, are shown on leasing maps, and are described and numbered as follows:

	LOCATED WITHIN		
TRACTS	TOWNSHIPS	RANGES	GRID NUMBERS
C23-1 thru 6	13N.	6E.	U-3-2
C23-7 thru 13	10N. and 11N.	5E.	U-3-5
C23-14 thru 28	13N.	9E. thru 12E.	U-3-1
C23-29 thru 47	9N. thru 12N.	11E. and 12E.	U-3-6
C23-48 thru 50	13N.	13E.	U-3-1
C23-51 thru 86	9N. thru 12N.	13E. thru 16E.	U-3-7
C23-87 thru 140	9N. thru 11N.	17E. thru 20E.	U-2-2
C23-141 thru 159	9N. and 10N.	21E. thru 24E.	U-2-1
C23-160 thru 171	7N. and 8N.	23E. and 24E.	U-2-4
C23-172	13N.	9E.	U-3-1
C23-173 thru 175	13N.	8E.	U-3-2
C23-176 thru 179	9N.	12E.	U-3-6

Total acreage included in the sale is 450,858.47 acres, comprising a total of 179 tracts.

LEASE AWARDS

A lease will be awarded on each tract to the responsible qualified bidder offering the highest cash bonus for that tract unless all bids on the tract are rejected or a preference right is exercised. If a lease is not issued to a bidder whose bid is retained, the lands in the tract involved will be held and be subject to nomination and offering at a later sale.

(a) A separate bid shall be submitted on each tract.

(b) A double envelope system will be used. The outside envelope should be marked: "State of Alaska Competitive Oil and Gas Lease Sale No. 23. Not to be Opened Until 8:00 a.m., A.D.T., on September 10, 1969." The outside envelope should *not* identify either the bidder or the tract. The inner envelope shall state on the outside: Name and address of the bidder(s); amount of bonus bid per acre; total amount of bid; and tract designation number. The inner envelope shall contain the bid and the bid deposit. The bid shall be submitted in duplicate on form DL-5 (revised 5/67) or image copy thereof, and shall be accompanied by one or more cashier's or certified checks drawn on any solvent bank in the United States, money order, or cash or any combination thereof in a total amount of at least 20 percent (20%) of the amount of the bid.

(c) No executed lease form DL-1 need be included with the bids.

(d) The bid deposit checks and money orders shall be payable to the Department of Revenue of the State of Alaska.

(e) All bids shall be submitted to and received by the Director or his authorized agent at the Division of Lands, 306 W. Fifth Avenue, Anchorage, Alaska, 99501, on or before 3:00 p.m., A.D.T., September 9, 1969, or at the Division of Lands' temporary office in the Sydney Laurence Auditorium, 6th and "F" Streets, Anchorage, Alaska, 99501, from 7:00 a.m., A.D.T., to 8:00 a.m., A.D.T., September 10, 1969. No bids received thereafter will be considered.

SUCCESSFUL BIDS

(a) When the lease is awarded, the Director shall notify the interested parties. Within ten (10) days after receipt of such notice, the successful bidder shall pay the balance of the bonus bid and the first year's rental in the amount of One Dollar ($1.00) per acre or fraction thereof, and shall submit two fully executed copies of form DL-1 (revised 10/63 and amended pursuant to Ch. 65, SLA, 1969).

(b) Payment of the balance of the bonus bid and first year's rental shall be made in United States funds or collected funds on deposit in the Bank of America N.T. & S.A., San Francisco Main Office No. 33, 485 California Street, San Francisco, California, 94120, or Los Angeles Main Office No. 600, 660 South Spring Street, Los Angeles, California 90014.

(c) Each lease shall be conditioned upon the payment of an annual rental of One Dollar ($1.00) per acre or fraction thereof in advance, on or before the beginning of each lease year prior to completion of a well capable of producing oil and/or gas in paying quantities on the leased lands.

(d) The royalty rate on production shall be twelve and one-half percent (12½%).

(e) A minimum royalty of One Dollar ($1.00) per acre or fraction thereof, shall be payable at the expiration of each lease year that begins on or after a discovery of oil and/or gas in paying quantities on the leased lands. Any royalty paid on production during a lease year shall be credited on the minimum royalty for that year.

(f) Each lease will permit surface entry on the leased land for exploration and development of oil and gas.

(g) Leases will be issued on State of Alaska competitive lease form DL-1 (revised 10/63 and amended pursuant to Ch. 65, SLA, 1969) and will include a directional drilling clause and other clauses regarding protection of wildlife.

(h) Each lease will be for a primary term of ten (10) years.

FORMS AND INFORMATION

The DL-5 Bid Form and DL-1 Lease Form may be obtained from, and the applicable regulations examined at, the office of the Division of Lands, 306 W. Fifth Avenue, Anchorage, Alaska, 99501. Copies of the 8 protraction sheets identifying the leasing tracts offered are available for examination without charge at the office of the Division of Lands, 306 W. Fifth Avenue, Anchorage, Alaska, between the hours of 10:00 a.m., and 3:00 p.m., on any business day and may be purchased at Two Dollars ($2.00) per sheet on a scale of 1 inch to the mile.

The right is reserved to waive technical defects in this publication.

F. J. KEENAN, Director

/s/ Pedro Denton

By: Pedro Denton
Chief, Minerals Section

This notice will be published on August 12, August 19, and August 26, 1969, in the Anchorage Daily News and Jessen's Daily of Fairbanks.

NOTICE OF CLARIFICATION
COMPETITIVE OIL AND GAS LEASE SALE NO. 23

In the Notice of Competitive Oil and Gas Lease Sale No. 23, dated August 11, 1969 and published on August 12, 1969, the term "United States funds" means funds immediately payable in United States currency or deposits in any Federal Reserve Bank in the United States of America and are equivalent to federal funds or deposits of any member bank of the Federal Reserve System which are payable on a same day basis through any Federal Reserve Bank. The term "collected funds" means cash or its equivalent such as checks, drafts, money orders, etc. which have been collected and are available for immediate credit.

The right is reserved to waive technical defects in this publication.

F.J. KEENAN, Director
Alaska Division of Lands

/s/ Pedro Denton

By: Pedro Denton
Acting Director

This notice was published on August 16, 1968, in the Anchorage Daily News and Jessen's Daily of Fairbanks.

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978

No. 78-194

CHAMPION OIL COMPANY, INC.,
An Alaska Corporation,
Petitioner,

CHARLES F. HERBERT, Commissioner,
and THOMAS E. KELLY, Former
Commissioner of Department of
Natural Resources; F. J. KEENAN,
Director of Division of Lands;
THE STATE OF ALASKA;
and F. T. WETZEL,
Respondents.

Petitioner's Reply Memorandum on Petition for a Writ of Certiorari to the State of Alaska

PETITIONER'S REPLY BRIEF

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INDEX

Page

Authorities Cited

Cases:

Bishop v. Wood, 426 U.S. 341 (1976) 1, 2, 4, 5

Board of Regents v. Roth, 408 U.S. 564 (1971) 3, 4

Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) 2

Fuentes v. Shevin, 407 U.S. 67, 86 (1972) 4

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1925) 3

Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (1978) 3

Perry v. Sindermann, 408 U.S. 593 at 600-601 (1972) ... 3,4

Other Authorities:

1 K. Davis, ADMINISTRATIVE LAW TREATISE, § § 6.13-6.16, 6.20 (1970 Supp.) 2

Regulations:

11. A.A.C. 84 3

11 A.A.C. 505 3

11 A.A.C. 505.43 2

11 A.A.C. 505.51 2

Statutes:

Alaska Stat. § 38.05.18, *et seq.* 3

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Petitioner's Reply Memorandum

PETITIONER'S REPLY BRIEF

In their Response Brief in No. 78-194, respondents have concluded that petitioner was not entitled to minimal due process protections regarding its participation in Alaska's 23rd Competitive Oil and Gas Lease Sale (hereafter referred to as Sale). Relying on *Bishop v. Wood*, 426 U.S. 341 (1976), respondents seem to have reached this conclusion by the following reasoning: first, the Court held that a property interest (or legitimate claim of entitlement) can be created by ordinance (pre-

sumably, any valid legislative enactment); second, the existence of an interest and the dimensions of due process to be accorded such interest must be ascertained by reference to state law; third, if the state does not guarantee an interest or benefit to a party, then the latter has no protected interest;[1] and, fourth, even if a party does have an interest, he need be accorded only such protection as the state may have provided within its enactment(s). Next asserting that petitioner has predicated its claim solely on its *participation* in the Sale (Response Brief, pp. 9,12), respondents point out that no enactments or notices guaranteed issuance of leases to petitioner, nor was there any violation by the State of such procedures or protections as may have existed. Finally, respondents assert that even if pertinent statutes, regulations and notices were unclear, administrative regulations, (11 A.A.C. 505.43, 11 A.A.C. 505.51) gave the agency authority to reject all bids.[2] (See Response Brief, pp. 10-11). Undeniably, respondents' conclusions are permissible (although, petitioner contends, nonetheless constitutionally infirm and improper) under *Bishop*.

However, respondents' argument proceeds from a misstatement of petitioner's argument; that is, petitioner does not

1. A fair reading of *Bishop* does not support the conclusion that such a "guarantee" is a constitutional prerequisite to 14th Amendment protection of an interest. Rather, it would appear that the Supreme Court of North Carolina had so held, and the Court therefore found such to be prerequisite in *that* case.

2. Although a complete affront to concepts of due process, Respondents' ultimate conclusion is that the State was even free to carry out the lease sale pursuant to *unclear* statutes, regulations, and notices, since authority existed within its own regulations (11 A.A.C. 505.43) to reject all bids. (Response Brief, pp. 10-11). Regarding the need for maintaining, upgrading and clarifying standards and principles which guide agency action, see the comments of Bazelon, Chief Judge, in *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); see also 1 K. Davis, ADMINISTRATIVE LAW TREATISE §§6.13-6.16, 6.20 (1970 Supp.). It may be noted that an open-ended power residing in an agency by which it may avoid its own rules, or deny applications for benefits in the absence of standards, opens the door to unreasonable discrimination and invites political graft and corruption.

contend that it possessed a constitutionally protected interest merely or solely by way of *participation* in the Sale. Rather, petitioner's interest exists as a result of enabling statutes[3] which permit the Sale and regulations[4] which guide, control, and condition the acts of agency personnel as they carry out the Sale, as well as set forth the requirements which must be met in order to meaningfully compete for proffered government benefits.

The statutes, regulations, and notices thereof which attended the Sale gave rise to petitioner's reasonable reliance and legitimate expectations and, coupled with participation, gave petitioner a property interest entitled to protection under the Fourteenth Amendment.[5] *Perry v. Sindermann*, 408 U.S. 593, 600-601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, at 571-572 (1971); *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398 (1978).[6]

Respondents have argued that petitioner's participation in the Sale did not "vest" in it any property interest (Response Brief, pp. 8, 9, 13, 14) entitled to due process protections. Whether respondent is speaking in terms of fee simple absolute, or otherwise, it is apparent that "the Fourteenth Amendment's protection of 'property' . . . has never

3. Alaska Stat. §38.05.18, *et seq.*

4. 11 A.A.C. 505; 11 A.A.C. 84.

5. Petitioner respectfully proposes the following test for the identification of property interests or "legitimate claims of entitlement" meriting protections of the Due Process Clause: (1) is there a statutorily-created benefit; (2) have rules been promulgated setting forth procedures for acquiring this benefit; (3) have conditions regarding eligibility been promulgated and published; (4) has the aggrieved party availed or attempted to avail himself/herself of such benefits? Affirmative answers to these questions would seem to indicate the presence of a reasonable and legitimate expectation meriting due process protections. A similar test would be appropriate regarding mutual understandings and practices existing between the state and private party. *See*, e.g., *Perry v. Sindermann*, 408 U.S. 593, at 600-601 (1972).

6. Compare *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117 (1925).

been interpreted to safeguard only the rights of undisputed ownership." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972); *accord*, *Craft*, *supra*, at 4401.[7]

The conflict existing between the holdings in *Bishop* and *Craft* poses a serious and substantial question of constitutional law which directly bears upon whether or not the several states will be allowed to control and curtail the reach of the Fourteenth Amendment. Pared to its essence, respondent's argument, relying as it does upon *Bishop*, is a bold assertion that due process protections regarding "property" interests shall enjoy such stature as a state may wish to grant. (See f.n. 2, *supra*, and Response Brief, pp. 10-11).

Despite respondents' avoidance of the issue, it seems indisputably clear that *Bishop* and *Craft* should be reviewed and their conflict resolved. Therefore, petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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7. It seems clear that the holding in *Bishop* would indeed permit a state to engage in a right-versus-privilege analysis of property interests and thereby control the definition of such interests for purposes of due process protection, while such would not be possible under *Craft* because "federal constitutional law determines whether that interest to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Id., at 4400; *accord*, *Board of Regents v. Roth*, 408 U.S. 564 at 577 (1972), and *Perry v. Sindermann*, 408 U.S. 593 at 602 (1972).